BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KASEY D. BELTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,004,852
FEDERAL EXPRESS	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the January 2, 2004 Award entered by Administrative Law Judge Nelsonna Potts Barnes. At the parties' request, the Board placed this appeal on its summary docket for disposition without oral argument.[1]

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Gary A. Winfrey of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the parties' November 24, 2003 stipulation regarding claimant's average weekly wage.

ISSUES

Claimant alleges that he injured his low back working for respondent on May 30, 2002, while dragging heavy coolers into the back of his delivery van. In the January 2, 2004 Award, Judge Barnes determined claimant sustained a 57 percent task loss, a 63 percent wage loss, and a 60 percent work disability (a permanent partial general disability greater than the functional impairment rating).

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[1] For purposes of K.S.A. 2003 Supp. 44-551(b)(1), June 16, 2004, is deemed the date arguments were presented to the Board.

Respondent contends Judge Barnes erred. Respondent argues (1) claimant failed to prove he injured his back at work, (2) any back injury that claimant sustained at work was only temporary, (3) any permanent back injury that claimant sustained at work should be compensated based upon his functional impairment rating, (4) any work disability that claimant sustained due to the May 2002 accident should be based upon a 14 percent task loss and a 49 percent wage loss, and (5) any award of permanent partial general disability benefits should be reduced by five percent due to a preexisting whole body functional impairment. Consequently, respondent asks the Board to either deny claimant's request for permanent partial general disability benefits or reduce the permanent partial general disability percentage to either five percent or 26.5 percent.

Conversely, claimant contends the January 2, 2004 Award should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant permanently injure or permanently aggravate his low back on May 30, 2002, working for respondent?

2. If so, what is the nature and extent of his injury and disability?

3. If claimant is entitled to an award of permanent partial general disability benefits, did claimant have a preexisting functional impairment to his low back that would reduce those benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent employed claimant approximately 19 years as a courier who delivered and picked up packages. On Thursday, May 30, 2002, claimant noticed his back tightening after dragging several 145-pound coolers from a loading dock into his delivery van. Shortly afterwards, claimant experienced numbness in his left leg. Claimant reported the incident to respondent the following Monday and completed an accident report.

But this was not the first time that claimant had experienced low back and left leg symptoms. Claimant believed he first injured his back in 1985 when he slipped on some ice or gravel and struck his back on a bolt on the frame of his van. Following that initial incident, claimant experienced several instances where he sought medical treatment for low back pain and leg symptoms. On each occasion, however, claimant returned to work as a courier without any medical restrictions. Claimant's old medical records failed to

disclose that he was ever determined to have a permanent impairment or ever given a functional impairment rating.

Respondent referred claimant to Wesley Occupational Health Services. Claimant was given conservative medical treatment and assigned light duty activities[2] for 90 days.[3] On September 10, 2002, the doctor released claimant to work without restrictions. But claimant did not return to work for respondent. Instead, respondent terminated claimant on September 18, 2002, for violating company policy.

At the time of regular hearing, claimant was self-employed marketing a device he had invented for precision rifle shooting. Claimant earns approximately $400 per week in that endeavor.

1. Did claimant permanently injure or permanently aggravate his low back on May 30, 2002, working for respondent?

Four doctors testified about claimant's May 30, 2002 back injury. Dr. Frederick R. Smith, who specializes in physical medicine and who saw claimant on three occasions from July through September 2002, testified that claimant's symptoms did not improve with the conservative treatment that he provided. Dr. Smith concluded claimant sustained a lumbosacral strain and sprain superimposed upon preexisting spondylolisthesis. According to Dr. Smith, claimant has a two percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). The doctor testified, in part:

> Yes. I have given him a two percent whole person impairment just based on some residual symptoms. I didn't feel like he quite fit about the Level II of the DRE group in the AMA Guides. As I mention in my note, I felt a good deal of his problems were preexisting. And if I remember, he had at least one previous back injury in the past, and I believe this had been some kind of a chronic recurrent problem for him. And I felt at the time that I saw him that he had essentially come back to his preinjury status.[4]

Dr. Smith's October 3, 2002 medical notes clarify that the doctor attributed the two percent whole body functional impairment to claimant's May 2002 work injury.[5]

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[2] R.H. Trans. at 14-15.

[3] Smith Depo. at 18-19; Hummelsheim Depo., Ex. 10.

[4] Smith Depo. at 8-9.

[5] Smith Depo., Ex. 4.

Dr. Smith released claimant from treatment on September 10, 2002, after claimant declined both back surgery and injections. The doctor recommended that claimant consider sedentary work. Moreover, had claimant not requested a full release, the doctor testified he would have probably either left a 50-pound weight restriction on claimant or referred claimant for a functional capacity evaluation. The parties did not ask Dr. Smith to provide a task loss opinion based upon a 50-pound lifting restriction.

Claimant's attorney employed Dr. Pedro A. Murati to examine claimant in October 2002. Dr. Murati is board-certified in physical medicine and rehabilitation. The doctor diagnosed low back pain secondary to lumbosacral strain with spondylolisthesis and degenerative disc disease at L5-S1, which comprised a 10 percent whole body functional impairment under the AMA *Guides* (4th ed.). The doctor's examination revealed at least two clinical signs of radiculopathy into the left leg – muscle strength testing in the left toe extensor and atrophy in the left calf.

According to Dr. Murati, claimant should not ever lift, carry, push or pull more than 50 pounds. But Dr. Murati concluded claimant could on a rare occasion bend, crouch and stoop, and lift, carry, push and pull 50 pounds. Further, the doctor determined claimant could occasionally sit, climb stairs and ladders, squat, crawl, drive, and lift, carry, push, and pull up to 35 pounds. Dr. Murati also concluded claimant could frequently stand and walk, and lift, carry, push, and pull up to 20 pounds. Dr. Murati also determined claimant should alternate sitting, standing and walking.

Reviewing a list of work tasks that claimant performed in the 15-year period before the May 2002 incident prepared by claimant's labor market expert, Jerry D. Hardin, Dr. Murati indicated claimant had lost the ability to perform four of the seven tasks, or 57 percent. On the other hand, reviewing a list of former tasks prepared by respondent's vocational expert, Monty Longacre, claimant lost the ability to perform five of 14 tasks, or 36 percent.

In June 2003, board-certified orthopedic surgeon Dr. C. Reiff Brown examined and evaluated claimant's injuries at Judge Barnes' request. According to Dr. Brown, claimant sustained a five percent whole body functional impairment as a result of the May 2002 accident at work. The doctor's June 27, 2003 report to Judge Barnes reads, in part:

> In my opinion, this man has a typical history of degenerative disc disease at L5-S1 and he has a superimposed grade one spondylolisthesis at L5 also present. There is an element of a radiculopathy by history, however there is no evidence of radicular findings on physical examination. In my opinion, this man does not need particular further treatment at this place and time, however he is in need of work that does not involve the heavy lifting and repeated bending that is necessary with his FedEx job. I believe his symptoms will settle down to an acceptable level if he

> maintains his level of activity within the work restrictions I will provide. In my opinion, he has a 5% whole body impairment based on his placement in the DRE lumbosacral category II, this is based on the degenerative disc disease at L5-S1 and the spondylolisthesis that has been pre-existing. This 5%, in my opinion, is the result of the May 30, 2002 event. It will be necessary for him to permanently avoid lifting above 75 pounds occasionally, 40 pounds frequently, and all lifting will have to be done utilizing proper body mechanics. He will have to avoid frequent flexion and rotation of the lumbar spine greater than 30 degrees.[6]

Dr. Brown concluded claimant lost the ability to perform four of the seven tasks, or 57 percent, from Mr. Hardin's task list and lost the ability to perform two of the 14 tasks, or 14 percent, from Mr. Longacre's list.

Respondent hired Dr. John F. McMaster to examine and evaluate claimant's injuries. Dr. McMaster is board-certified in undersea medicine and hyperbaric medicine, emergency medicine, and family practice.

Dr. McMaster examined claimant in October 2003 and concluded claimant's May 2002 incident at work only temporarily aggravated his back. Dr. McMaster also determined claimant had a five percent whole body functional impairment but that it all preexisted the May 30, 2002 incident at work. Furthermore, the doctor concluded claimant was able to perform all of the former work tasks set forth in both Mr. Longacre's and Mr. Hardin's task lists.

Like Dr. Murati, Dr. McMaster also found the left calf was smaller than the right. But because Dr. McMaster could not objectively verify claimant's complaints of left calf numbness, the doctor could not conclude that claimant was experiencing radiculopathy. Dr. McMaster agreed that radiculopathy would have increased claimant's whole body functional impairment to 10 percent. Moreover, Dr. McMaster acknowledged that according to claimant's old medical records his symptoms resolved following the instances he had sought medical treatment for his back complaints before the May 2002 work incident. More importantly, Dr. McMaster believed claimant was continuing to experience back symptoms when he saw claimant approximately 17 months after the May 2002 incident and the reason that claimant's condition warranted a five percent whole body functional impairment rating under the AMA *Guides* was due to those continuing symptoms.

The Board concludes the greater weight of the evidence establishes that claimant sustained a permanent injury to his back as a result of the May 30, 2002 incident at work. The Board is persuaded by Dr. Brown's opinion that claimant now has a five percent whole

[6] Brown Depo., Ex. 1 at 2-3.

body functional impairment following his May 2002 accident and resulting back injury. The record further establishes that claimant should no longer perform his former job as a courier.

2. What is the nature and extent of claimant's injury and disability?

Because claimant has sustained an injury that is not set forth in the scheduled injury statute, K.S.A. 44-510d, his entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the permanent partial general disability formula. Respondent argues claimant was terminated for violating company policy and, therefore, claimant's permanent partial general disability should be limited to his functional impairment rating.

Following the May 30, 2002 incident, claimant continued working for respondent but in an accommodated position. The record is not entirely clear, but it appears claimant's accommodated position ended on approximately August 30, 2002. According to an October 27, 2003 letter from respondent's counsel, respondent paid claimant temporary partial disability benefits for the period from June 10, 2002, through August 30, 2002, followed by temporary total disability benefits from August 31, 2002, through September 9, 2002.

But when claimant's 90 days of light duty work terminated on August 30, 2002, claimant was not working and no longer earned 90 percent of his pre-injury average weekly wage. Accordingly, under K.S.A. 44-510e and the court decisions that have interpreted that statute and its predecessor, the Board must evaluate claimant's permanent partial general disability, including whether claimant has made a good faith effort to obtain or retain employment, which is a question of fact determined on a case-by-case basis. In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.[10]

In early June 2002, after assigning claimant lighter, accommodated work, the company wrote claimant advising him that he was required to submit an updated doctor's note within 24 hours of each medical visit. The June 6, 2002 letter from respondent's human resources department to claimant read, in part:

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[9] *Id.* at 320.

[10] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* ___ Kan. ___ (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

> You are required to keep both Jane Dutcher [respondent's operations manager] and myself apprised on your progress, status, and possible return to work date. You must submit an updated doctor's note after each follow up visit, within 24-hours verifying your current work ability. Failure to submit such documentation will mean that you are on an unauthorized leave of absence, subject to the same provision as other no call/no show absences, as specified in the Attendance Policy (P1-20).[11]

On September 10, 2002, Dr. Smith saw claimant in the morning and released him to return to work without restrictions. Claimant did not provide respondent's station manager, Diann Hummelsheim, with Dr. Smith's medical release until approximately 5:30 p.m. the next day, which was several hours late. Claimant attributed the delay in submitting the medical release to respondent to wanting to speak with his attorney, who happened to be out of town. According to claimant, he believed his job was in jeopardy because he did not feel he could perform his regular job duties due to his continuing low back and left leg symptoms, which had not improved.

On September 18, 2002, respondent terminated claimant as his failure to submit his medical release within 24 hours of his last doctor's appointment constituted an unauthorized leave of absence and a third violation of company policies within a 12-month period. Accordingly, company policy sanctioned claimant's firing.

The record establishes respondent issued claimant a warning letter on March 12, 2002, for being disrespectful to a customer who had accused him of breaking her garage door. On June 11, 2002, respondent issued claimant a written performance reminder for having injured himself at work on October 17, 2001 (when he stumbled over the turned edge of a carpet while delivering a package) and for having injured himself at work on May 30, 2002 (while loading the heavy coolers). The June 11, 2002 letter to claimant read, in part:

> As you recall, you informed me on June 4, 2002 that you had injured yourself on May 30, 2002, the previous Thursday. You did not fill out a first report of injury at that time. You also had a previous injury on October 17, 2001. This puts you at two unsafe acts in an 18-month period. It has now come to my attention that on March 2 *[sic]*, 2002 you had been issued a warning letter for misconduct.
>
> I am therefore issuing you this written performance reminder. Your repeated failure to meet established performance standards is in violation of P8-85, *Unsafe Acts/Worker Injuries Policy*, P2-50, *Performance Improvement Policy* (copy attached). Your receipt of an additional performance reminder for this or any other

[11] Hummelsheim Depo., Ex. 7.

> performance problem may subject you to additional discipline up to and including an additional decision day, or termination of your employment.[12]

According to station manager Hummelsheim, claimant was chastised for the October 2001 and May 2002 accidents as both accidents were deemed avoidable. The record is not entirely clear, but the May 2002 accident was apparently deemed avoidable as claimant had to maneuver at least one of the heavy coolers over a flat tire that was in the back of the delivery van. Nonetheless, it is respondent's practice that flat tires are not repaired until the end of a courier's route and, therefore, the tires remain in the van until the end of the day.

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company policy. The Board, however, believes the test is much broader. The Board concludes the appropriate test is whether claimant made a good faith effort to retain his employment with respondent and company policy is only one factor to be considered in that analysis.

As indicated above, respondent terminated claimant because he had a warning for misconduct, had a written performance reminder for having two work-related accidents, and failed to provide his medical release to respondent within a timely manner, all within a 12-month period. Consequently, two of the violations cited were directly related to claimant's May 30, 2002 accident. The May 2002 accident represented the second avoidable accident that claimant sustained in an 18-month period and, therefore, the accident violated company policy. In addition, claimant's failure to provide respondent the work release slip within 24 hours was due to his desire to consult with his attorney regarding his return to work.

The Board would be hard-pressed to find that claimant's actions, which led to his termination, demonstrated a refusal to work or the lack of a good faith effort.

As stated above, the issue is not whether claimant was terminated in compliance with company policy but whether claimant has made a good faith effort to obtain and retain employment when considering all the facts and circumstances. Despite claimant's termination from respondent's employ, the Board concludes claimant made a good faith effort to retain his employment with respondent following his May 2002 accident. Consequently, claimant's actual post-injury earnings of $400 per week should be used for the permanent partial general disability formula.

[12] Hummelsheim Depo., Ex. 4.

Comparing claimant's actual post-injury earnings of $400 per week with his stipulated pre-injury average weekly wage of $1,068.10 yields a 63 percent wage loss for purposes of the permanent partial general disability formula.

As indicated above, the record contains several opinions regarding the extent claimant lost the ability to perform former work tasks. Depending upon which task list was utilized, claimant's expert Dr. Murati placed claimant's task loss at 36 percent and 57 percent. On the other hand, the court-appointed examiner Dr. Brown determined claimant's task loss was 14 percent and 57 percent. And respondent's expert Dr. McMaster concluded claimant had not lost the ability to perform any of his former tasks.

The Board finds Dr. Brown's opinions the most persuasive and finds that claimant has lost the ability to perform 36 percent of his former work tasks. The Board has examined both task lists as prepared by Mr. Hardin and Mr. Longacre and is not persuaded that either list is more accurate or more appropriate than the other.

Averaging claimant's 63 percent wage loss with his 36 percent task loss creates a 50 percent permanent partial general disability.

3. Did claimant have a preexisting functional impairment in his low back that would reduce his award for permanent partial general disability benefits?

It is not clear from Dr. Smith's testimony whether he concluded claimant's back condition before May 2002 warranted a functional impairment under the AMA *Guides*. Neither Dr. Brown nor Dr. Murati were asked about preexisting functional impairment. And Dr. McMaster's opinion regarding preexisting functional impairment was dependent upon which attorney was asking the question.

Dr. McMaster initially testified that all of claimant's permanent functional impairment preexisted the May 2002 incident. But on cross-examination, the doctor also testified that he was unable to reach an opinion within a reasonable degree of medical probability whether claimant's condition before May 2002 would have placed him in DRE Lumbosacral Category I (which would equate to a zero percent functional impairment) or DRE Lumbosacral Category II (which would equate to a five percent whole body functional impairment).

> Q. (Mr. Carmichael) We know that prior to May 30 of 2002 he most likely had some structural defects radiographically demonstrated in the spine, correct? Absent a complaint of symptoms, ongoing symptoms, in association with that structural defect, you would be of the opinion he would fit within a DRE Category I or zero percent impairment of function; is that correct?

> A. (Dr. McMaster) He could be placed in Category I. But then again, that requires an evaluation and face-to-face evaluation on my part, and I didn't have the opportunity to do that. It could be a I or a II if you used table 70.
>
> Q. Not having a face-to-face evaluation before the May 30, 2002, accident you cannot reach an opinion, within a reasonable degree of medical probability, as to whether he is to fit within a Category I or Category II; is that correct, doctor?
>
> A. That is correct, prior to May 30 [2002].[13]

Nevertheless, on redirect examination, Dr. McMaster responded he was not changing his testimony that claimant's five percent whole body functional impairment preexisted the May 2002 incident at work.

The Board is not persuaded that claimant's back problems before May 2002 actually warranted a functional impairment rating according to the criteria of the AMA *Guides*. Accordingly, respondent has failed to prove that claimant's 50 percent permanent partial general disability should be reduced because of a preexisting functional impairment.[14]

AWARD

WHEREFORE, the Board modifies the January 2, 2004 Award and reduces claimant's permanent partial general disability from 60 percent to 50 percent for the period commencing September 10, 2002.

Kasey D. Beltz is granted compensation from Federal Express for a May 30, 2002 accident and resulting disability. Based upon an average weekly wage of $1,068.10, Mr. Beltz is entitled to receive the following disability benefits:

For the period from June 10, 2002, through August 30, 2002, Mr. Beltz is entitled to receive a total of $2,416.28 in temporary partial disability benefits.

For the period from August 31, 2002, through September 9, 2002, Mr. Beltz is entitled to receive 1.43 weeks of temporary total disability benefits at $417 per week, or $595.71.

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[13] McMaster Depo. at 62-63.

[14] See K.S.A. 44-501(c).

Commencing September 10, 2002, Mr. Beltz is entitled to receive 207.50 weeks of permanent partial general disability benefits at $417 per week, or $86,527.50, for a 50 percent permanent partial general disability.

The total award is $89,539.49.

As of July 12, 2004, Mr. Beltz is entitled to receive $2,416.28 in temporary partial disability compensation, plus 1.43 weeks of temporary total disability compensation at $417 per week in the sum of $595.71, plus 97.43 weeks of permanent partial general disability compensation at $417 per week in the sum of $40,628.31, for a total due and owing of $43,640.30, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $45,899.19 shall be paid at $417 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Gary A. Winfrey, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director